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# Off the Reservation: Native American Tribes Reasserting Sovereign Immunity to Trump Arbitration Agreements

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## I. INTRODUCTION

The Supreme Court's decisions in *Turner v. United States*[1] and *United States v. U.S. Fidelity & Guaranty Co.*[2] firmly established the doctrine of tribal sovereign immunity. A Native American tribe enjoys sovereign immunity from suit, unless "Congress has authorized the suit or the tribe has waived its immunity."[3] Any such waiver must be clear and unequivocal to be effective.[4] Furthermore, "[c]ourts construe waivers of a tribe's sovereign immunity strictly and hold a strong presumption against them."[5]

Until recently, it was well settled that arbitration clauses constituted a clear waiver of a Native American tribe's sovereign immunity. In *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Supreme Court held that arbitration agreements constituted an express waiver of sovereign immunity.[6] However, since that time, tribes have contracted around the Court's decision by excluding certain enforcement portions of arbitration rules.

In *California Parking Services, Inc. v. Soboba Band of Luiseno Indians* ("*Soboba*"), the Fourth District California Court of Appeal held that an arbitration clause in a contract between a private contractor and a Native American tribe was not a waiver of the tribe's sovereign immunity.[7] The court distinguished *Soboba* from *C & L Enterprises* because this clause specifically excluded a provision, which provided for court enforcement of arbitral awards.[8] But should this be the outcome?[9] This article will examine the issue of when arbitration clauses rise to the level of a waiver of sovereign immunity; whether tribes should be allowed to avoid the

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[1] Turner v. United States, 248 U.S. 354 (1919).

[2] United States v. U.S. Fid. & Guar. Co., 309 U.S. 506 (1940).

[3] Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998); *see also* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

[4] C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001).

[5] Cal. Parking Servs., Inc. v. Soboba Band of Luiseno Indians, 128 Cal. Rptr. 3d 560, 563 (Cal. Ct. App. 2011) (citing Big Valley Band of Pomo Indians v. Superior Ct., 35 Cal. Rptr. 3d 357 (Cal. Ct. App. 2005)).

[6] *C & L Enters.*, 532 U.S. at 423.

[7] *Soboba*, 128 Cal. Rptr. 3d at 562, 565.

[8] *Soboba*, 128 Cal. Rptr. 3d at 565. The provision was Rule 48(c) of the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association, which reads, "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *Commercial Arbitration Rules and Mediation Procedures, Rule 48(c)*, AMERICAN ARBITRATION ASSOCIATION (June 1, 2009), http://www.adr.org/aaa/faces/rules (follow "Rules" hyperlink; then follow "Commercial Arbitration Rules and Mediation Procedures" hyperlink) (last visited Apr. 19, 2012).

[9] The *Soboba* court noted California Parking Services' argument that the court "should nevertheless find a waiver on the ground that it would be 'wrong and improper' to discard an entire arbitration provision simply because the Soboba Band 'slipped in' the words 'excluding Rule 48(c),' at the end of a sentence." The court stated that it was "sympathetic to the position of CPS," but it was "constrained in this case by the heavy presumption against waivers of immunity." *Id*. at 564.

enforceability of arbitration awards; and what practitioners should do when negotiating with Native American tribes to ensure the arbitral process goes forward.

## II. ARBITRATION CLAUSES CONSTITUTE WAIVER OF SOVEREIGN IMMUNITY

Prior to *C & L Enterprises*, there was considerable disagreement amongst lower courts as to whether arbitration agreements constituted a waiver of tribal sovereign immunity. In *C & L Enterprises*, the Potawatomi Nation, "a federal recognized Indian Tribe," solicited C & L to install a roof on a commercial building.[10] The tribe owned both the building and the off-reservation land. The parties entered into a contract, which contained an arbitration provision and a choice-of-law clause.[11] Before C & L began work, however, the tribe opted "to change the roofing material from foam (the material specified in the contract) to rubber guard."[12] The tribe then solicited new bids and hired a different company to install the roof. C & L submitted an arbitration demand, alleging that the tribe "dishonored the contract."[13] The tribe declined to participate in the arbitration and asserted sovereign immunity. After the conclusion of the proceeding, the arbitrator rendered an award in favor of C & L in the amount of $25,400 in damages, plus attorney's fees and costs.[14]

Weeks later, C & L filed suit, seeking to enforce the award in an Oklahoma state court. The tribe appeared and moved to dismiss the action on the ground of sovereign immunity.[15] The district court denied the motion and confirmed the award. The Oklahoma Court of Civil Appeals affirmed, stating that "the [t]ribe lacked immunity because the contract giving rise to the suit was 'between an Indian tribe and a non-Indian' and was 'executed outside of Indian Country.'"[16] Thereafter, the Oklahoma Supreme Court denied review and the tribe petitioned for certiorari to the United States Supreme Court. While the petition was pending, the Court decided *Kiowa*, which held that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."[17] In light of this decision, the Supreme Court remanded for reconsideration. On remand, the Oklahoma Court of Civil Appeals held that the tribe was immune from suit under *Kiowa* and did not waive its sovereign immunity by entering into a contract that contained an arbitration clause.[18] The Oklahoma Supreme Court denied C & L's petition for review. The United States Supreme Court granted C & L's petition for certiorari to resolve the issue of whether an arbitration agreement constituted a waiver of a tribe's sovereign immunity.[19]

Justice Ginsburg, writing for the unanimous Court, declared that "the [t]ribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court; the

[10] *C & L Enters.*, 532 U.S. at 414.
[11] *Id*. at 415.
[12] *Id*. at 416.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Kiowa*, 523 U.S. at 760.
[18] *C & L Enters.*, 532 U.S. at 417.
[19] *Id*. at 418.

[t]ribe thereby waived its sovereign immunity from C & L's suit."[20] The court noted that the arbitration clause specified that the American Arbitration Association's Rules for the construction industry would apply, and that 48(c) of those rules stated, "the arbitration award may be entered in any federal or state court having jurisdiction thereof."[21] By agreeing to the arbitration under the AAA rules, the tribe effectively waived its sovereign immunity because it agreed to enforcement of an award by a federal or state court.[22]

For a time, this opinion made it clear that any arbitration agreement entered into by a Native American tribe would constitute a waiver of sovereign immunity. Focusing on the Court's reasoning which pertained to Rule 48(c), however, tribes found a loophole.

## III. NO ENFORCEMENT, NO WAIVER

If the arbitration clause excludes the relevant enforcement rule, the tribes have not waived their sovereign immunity. In *Soboba*, "the Soboba Band, a federally recognized Indian tribe," contracted California Parking Services ("CPS") in March 2007 "to provide valet parking services to the Soboba Casino for three years."[23] The contract contained an arbitration clause that was fairly standard except for one minor tweak. The clause's declaration of the rules applicable to the arbitral proceeding stated that the proceeding "shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association (September 2005 edition or later) *excluding 48(c).*"[24] Even with this exclusion, however, the clause went on to state that "[t]he decision . . . shall be final and binding on both parties."[25] The contract also contained a choice-of-law provision, which stated that the "Agreement shall be governed by the laws of the State of California and, where applicable, Tribal and Federal Law."[26] In June 2009, after problems developed with CPS's valet service, the Soboba Band terminated the contract. Months later, CPS sought to compel arbitration pursuant to their contract.[27] Soboba demurred the motion to compel on the basis of sovereign immunity, and CPS opposed the demurrer. The district court denied CPS's petition to compel arbitration, holding that sovereign immunity barred compelling the Soboba Band to arbitrate.[28] The court reasoned that the tribe did not waive its sovereign immunity because the arbitration clause expressly excluded application of Rule 48(c), which provides that "[p]arties to an arbitration under these rules shall be deemed to have consented that

[20] *Id*. at 423.

[21] *Id*. at 419. Note that in the future, tribes can exclude this rule and similar AAA rules to avoid enforcement of an arbitration award. *See Soboba*, 128 Cal. Rptr. 3d at 565 (holding that the tribe did not waive its sovereign immunity because it excluded Rule 48(c) from the arbitration clause).

[22] After analyzing the choice-of-law clause in the contract, the Court also concluded that Oklahoma state court would be the appropriate forum to seek a judgment enforcing the award. *See C & L Enters.*, 532 U.S. at 419.

[23] *Soboba*, 128 Cal. Rptr. 3d at 562.

[24] *Id*. (emphasis in original).

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*.

judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof."[29]

The Court of Appeals for the Fourth District of California affirmed the lower court's decision. While agreeing to arbitrate would ordinarily constitute a waiver of sovereign immunity, the court observed that by excluding Rule 48(c), the tribe was not consenting to a state or federal court having jurisdiction over it.[30] Therefore, the tribe did not waive its sovereign immunity and could not be compelled to arbitrate the dispute. The court rejected CPS's arguments that the court should find waiver anyway because (1) it would be inequitable to disregard an entire arbitration clause only the on ground that the tribe "'slipped in' the words 'excluding Rule 48(c)' at the end of a sentence"; (2) at the very least, the tribe consented to arbitration if not for the enforcement of the award; and (3) the choice-of-law provision supports a finding of non-waiver.[31]

First, although the court was sympathetic to CPS's situation, the court was "constrained in this case by the heavy presumption against waivers of immunity."[32] The court noted that a waiver of immunity is completely voluntary, and a tribe "may prescribe the terms and conditions on which it consents to be sued."[33] Next, the court found that compelling an arbitration that would not result with enforcement of the award would be meaningless. While CPS's second argument was "attractive on its face, since any other reading would make the arbitration clause pretty much illusory . . . it [was] without legal support."[34] Therefore, the court stated that the tribe's "rejection of the court's jurisdiction to enforce an arbitral award necessarily implies its rejection of the court's jurisdiction to compel arbitration as well."[35] Finally, the inclusion of the choice-of-law-provision did not persuade the court. While the Supreme Court found in *C & L Enterprises* that a choice-of-law provision supported a waiver of immunity, "the Court's holding did not hinge on this provision."[36] The purpose of the provision was solely "to clarify which forum and what law would *enforce* the arbitral award," not whether any award could be enforced against the tribe.[37]

But is this the right outcome? To begin, there is no point of including an arbitration clause that does not provide for arbitration. While the parties are free to draft the arbitration

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[29] *Id*. This provision is identical to other AAA rules of arbitration; *see, e.g.*, *Employment Arbitration Rules and Mediation Procedures, Rule 42(c)*, AMERICAN ARBITRATION ASSOCIATION (Nov. 1, 2009), http://www.adr.org/aaa/faces/rules (follow "Rules" hyperlink; then follow "Employment Arbitration Rules and Mediation Procedures" hyperlink) (last visited Apr. 19, 2012); *Real Estate Industry Rules (Including a Mediation Alternative), Rule 50(c)*, AMERICAN ARBITRATION ASSOCIATION (June 1, 2009), http://www.adr.org/aaa/faces/rules (follow "Rules" hyperlink; then search "Real Estate"; then follow "Real Estate Industry Rules (Including a Mediation Alternative)" hyperlink) (last visited Apr. 19, 2012); *Home Construction Arbitration Rules and Mediation Procedures, ARB-48(c)*, AMERICAN ARBITRATION ASSOCIATION (June 1, 2007), http://www.adr.org/aaa/faces/rules (follow "Rules" hyperlink; then search "Real Estate"; then follow "Home Construction Arbitration Rules and Mediation Procedures" hyperlink) (last visited Apr. 19, 2012); *Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), Rule 51(c)*, AMERICAN ARBITRATION ASSOCIATION (Oct. 1, 2009), http://www.adr.org/aaa/faces/rules (follow "Rules" hyperlink; then search "Real Estate"; then follow "Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes)" hyperlink) (last visited Apr. 19, 2012).

[30] *Id*. at 563, 565.

[31] *Id*. at 564.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*. at 565 (emphasis in original).

clause how they like, an exclusion of the enforcement provisions defeats the entire purpose of arbitration—to provide a final, binding judgment. CPS's oversight of the Rule 48(c) exclusion rendered the arbitration clause and the choice-of-law provision useless. In the end, the Soboba Band potentially disguised their intentions by consenting to an arbitration clause but including an exclusion of Rule 48(c).

In addition, CPS failed to bolster its argument that the tribe waived its sovereign immunity when it consented to arbitration that "shall be final and binding on both parties."[38] This provision conflicts with the exclusion of Rule 48(c). How can the arbitration be final and binding without court enforcement of the award? Assuredly, the court in *Soboba* was restrained by the strict interpretation of waivers and the policy supporting tribal sovereign immunity. At the very least, it should be gleamed from this case that any doubt as to an arbitration award's enforcement would preserve the tribe's sovereign immunity despite the arbitration clause.

The silver lining to this loophole's creation is the extent that a tribe can use it. Say for instance the Soboba Band compelled CPS to arbitration. It could not consent to the arbitration, go through the process, and then assert sovereign immunity after an unfavorable award was rendered.[39] But this does not provide any consolation to parties—such as CPS—who either by their lack of experience or poor lawyering are unable to arbitrate their disputes with Native American tribes. As the Supreme Court observed in *Kiowa*, "In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or have no choice in the matter, as in the case of tort victims. These considerations might suggest a need to abrogate tribal immunity," but "we defer to the role Congress may wish to exercise in this important judgment."[40] Until such time, CPS and parties like it are reserved to being unable to compel arbitration.

## IV. CONCLUSION

In the end, the matter of tribal sovereign immunity waivers and arbitration clauses was once well settled following the Supreme Court's holding in *C & L Enterprises*. Seeking to avoid liability, however, tribes have created a loophole that, when used effectively, skirts the issue. By excluding enforcement provisions in the AAA rules, tribes can consent to arbitration and never be bound to it. Practitioners should be readily aware of this ability for tribes to avoid waiver of sovereign immunity and pay particular attention to the language employed in the arbitration clauses. Undoubtedly, this is not an ideal situation when contracting with Native American tribes. For now, however, practitioners must be cautious.

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[38] *Id*. at 562.

[39] *See* Oglala Sioux Tribe v. C & W Enters., 542 F.3d 224, 231 (8th Cir. 2008) ("Wholly mindful that a waiver of sovereign immunity must be clearly expressed, we hold that, under these conditions, where there are contractual arbitration agreements and a tribe actively participates in that arbitration, and in the course of that arbitration raises its own affirmative claims involving a clearly-related matter, the Tribe voluntarily and explicitly waives any immunity respecting that related matter . . .. If a tribe were allowed to operate under AAA rules, and after an adverse decision assert sovereign immunity and then walk away, it would convert sovereignty from a shield into a sword. A tribe could, with impunity, thumb its nose at authority to which it had voluntarily acquiesced. Sovereignty does not extend so far.").

[40] *Kiowa*, 523 U.S. at 759; *see also* Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 764 (1998) (Stevens, J., dissenting) (observing while it is too late to "repudiate the doctrine [of tribal sovereign immunity] entirely," the doctrine should not apply to off-reservation activities).